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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

JAMES CONROY,
Petitioner,

–against–

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

When a defendant has been charged with a generic crime, and the State has presented conceptually distinct and factually different theories to the jury, each with different victims, different accomplices and different evidence, does the Due Process Clause require that a jury unanimously agree on which theory the State has proven beyond a reasonable doubt?

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## OPINIONS BELOW

The opinion of the New York Supreme Court, Appellate Division, First Department is reported at People v. Conroy, 861 N.Y.S.2d 46 (1st Dept. 2008), and is set forth at App.1. The Certificate of the New York Court of Appeals denying leave to appeal is unreported, and is set forth at App. 10.

## JURISDICTION

The judgment of the Appellate Division, First Department was entered July 15, 2008. The decision of the Court of Appeals denying leave to appeal was entered August 29, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part

> No person shall be...deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person, of life, liberty, or property, without due process of law.

New York Penal Law §155.05 provides, in pertinent part:

> 1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.
>
> 2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:
>
> > (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses.

New York Penal Law §155.42 provides, in pertinent part:

> A person is guilty of grand larceny in the first degree when he steals property and when the value of the property exceeds on million dollars.

## STATEMENT OF THE CASE

Before he was charged with the crimes at issue in this case, Petitioner James Conroy had been a lawyer with an unblemished record for over thirty-five years, and a member in good standing of the Bar of the State of New York since 1967. He spent most of his distinguished career at the New York law firm that is currently known as Windels Marx Lane & Mittendorf ("Windels Marx"), concentrating in corporate and trust work for clients involved in sophisticated transactions.

Conroy's criminal conviction stems from his involvement, *as a lawyer*, in a series of transactions between a client of his firm, William J. Zylka, who was a consummate con-man in desperate need of cash, and Martin Boelens, the Trustee of an investment fund, Evergreen Security, Ltd. ("Evergreen"), who ran Evergreen like a Ponzi scheme and was in desperate need of assets to offset liabilities on Evergreen's balance sheet. A consultant to Boelens set up a meeting at Windels Marx, and, there, Boelens met Zylka. Zylka, pretending to have great family wealth and connections and falsely representing his interest in and the value of a limestone mining operation, convinced Boelens, who was trying to stave off financial disaster, to lend him Evergreen funds in exchange for guarantees in the mining operation. Boelens and Zylka engaged in three separate transactions over an 8-month period.

The gist of the Boelens-Zylka misconduct involved Boelens' transfer of increasingly large sums of Evergreen funds to a Zylka company, KBZ, in exchange for increasingly large guarantees. These guarantees allowed Boelens to show a large asset on Evergreen's balance sheet, making it appear as if the Fund was solvent. The first loan, in November, 1999, involved Evergreen's transfer of $5 million to KBZ in exchange for a five year non-recourse note secured by KBZ's interest in the mining property. The second, in May, 2000, involved the transfer of $9.7 million in exchange for increasing the non-recourse note to $190 million. The final transaction, in July, 2000, involved the transfer of $13 million to KBZ in exchange for a full recourse guarantee secured by all of KBZ's assets and a promissory note payable in five years.

The entire scheme collapsed when Zylka could not make good on his guarantees and Evergreen went bankrupt. Boelens and Zylka both pled guilty to numerous crimes, leaving Conroy, who was principally involved in drafting documents on the first

of the three loan transactions, to stand trial alone.[1]

Conroy had no financial stake in the Zylka-Boelens ventures. He engaged in activities solely as a lawyer: drafting documents and rendering legal advice in connection with the loan transactions. By the time of the third transaction, he was barely involved. Indeed, over Conroy's vocal opposition, Boelens, a lawyer himself, drafted the documents on that deal.

Nevertheless, Conroy was charged with first degree "larceny," in violation of Penal Law §155.42. He was tried twice. His first trial, in 2002, ended with a hung jury. The following year, Conroy - the sole defendant in a case involving a loss to investors of over $25 million – was convicted of three counts of larceny, two counts of tampering, and a count of conspiracy, and later was sentenced to a term of imprisonment of four to twelve years. On July 15, 2008, the Appellate Division, First Department vacated Conroy's convictions on the tampering counts, but affirmed on the larceny/conspiracy counts.

Under New York law, an indictment need only allege a "generic" larceny. People v. Levin, 57 N.Y.2d 1008, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982). But New York requires the State to prove the specific type of larceny – the conduct must "fall within the parameters of a common law or statutory form of larceny set forth in subdivision two of Penal Law § 155.05 and elsewhere." William Donnino, McKinney's Cons. Law of N.Y., Practice Commentaries, Book 39, Penal Law, Art. 155 at 165 (1999). Consequently, at trial, the People argued that Conroy had committed two very distinct forms of larceny: larceny by false pretenses and larceny by embezzlement.

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[1] Zylka was charged with larceny, conspiracy and engaging in a scheme to defraud. He pled guilty, but did not testify, asserting his Fifth Amendment privilege. Boelens also was charged in this case and with a federal crime in Florida. He pled guilty in both jurisdictions in exchange for testifying against Conroy.

Larceny by false pretenses requires a "false material statement about a past or presently existing fact." People v. Norman, 85 N.Y.2d 609, 619, 650 N.E.2d 1303, 627 N.Y.S.2d 302 (1995). Larceny by embezzlement is an entirely different crime: it is the "conversion by the embezzler of property belonging to another which has been entrusted to the embezzler to hold on behalf of the owner." People v. Yannett, 49 N.Y.2d 296, 301, 401 N.E.2d 410, 425 N.Y.S.2d 300 (1980).

In this case, the two theories of larceny involved different elements and were in conflict. Under one theory, larceny by embezzlement, Boelens stole money from Evergreen. Under that theory, Boelens was the principal of the crime, and Conroy aided and abetted his scheme to embezzle money from the Fund Boelens controlled. Under the radically different theory, larceny by false pretenses, Zylka defrauded Boelens, aided and abetted by his lawyer, Conroy. Under this theory, Zylka made false statements of material fact to Boelens on which Boelens relied in lending money to Zylka.

At trial, Conroy, faced with two conflicting theories of guilt, unsuccessfully sought a unanimity charge. (A.119-27)[2] The jury, however, was charged that it need not be unanimous as to whether the larceny was committed by false pretenses or by embezzlement, and instead was charged as follows:

> Should you unanimously determine that the prosecution has proven beyond a reasonable doubt that a larceny occurred with respect to [the first three] counts you need not be unanimous regarding which of these two theories apply.

(A.165-66)

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[2] The references to "A." are to Conroy's Appendix in the Appellate Division.

On appeal, Conroy argued that his due process right to a jury determination beyond a reasonable doubt was violated because the jury did not have to unanimously agree as to which type of larceny the People had proven. The Appellate Division disagreed, concluding that, even assuming the two theories of larceny were conflicting, Conroy had no constitutional right to have the jury decide which theory the People had proven beyond a reasonable doubt. (App. 6-8)

The propriety of that constitutional determination is the issue on this certiorari petition.

## REASONS FOR GRANTING THE WRIT

### THIS COURT SHOULD GRANT REVIEW BECAUSE THERE EXISTS A DEEPENING CONFLICT AMONG THE STATE COURTS AS TO WHETHER DUE PROCESS DEMANDS THAT, IF A STATE PROCEEDS ON CONFLICTING THEORIES OF A GENERIC CRIME, THE JURY MUST UNANIMOUSLY AGREE ON WHICH, IF ANY, THEORY THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT

This Petition raises an important and unresolved constitutional question that has created havoc in the courts of this country: when an indictment charges the defendant with a "generic" crime – in this case, "larceny" – and the jury is charged on two theories of liability that involve different elements, including different means of carrying out the offense, a different "shared" intent among the perpetrators, and/or different accomplices, does due process require that the jury be charged that it must unanimously agree on which, if any, theory the prosecution has proven beyond a reasonable doubt.

In this case, the two theories – larceny by false pretense and larceny by embezzlement – not only had different elements, they were fundamentally at odds with each other. If Boelens

embezzled funds from Evergreen, with Conroy's aid, then he was not defrauded by Zylka and he was not a victim of a larceny by false pretenses. Conversely, if Zylka defrauded Boelens, with Conroy's aid, then Boelens did not have the requisite intent to embezzle the funds entrusted to him. In short, the two crimes were not only conceptually distinct, they were inherently inconsistent.

Nevertheless, the jury was expressly instructed that it need not agree on which type of larceny the prosecution proved beyond a reasonable doubt. Consequently, it is entirely possible that the jury was divided in its verdict: that some jurors found that the People had proven, beyond a reasonable doubt, larceny by embezzlement – meaning they found that Boelens was an accomplice and not a victim of the crime. Other jurors may have found that the People proved, beyond a reasonable doubt, larceny by false pretenses – meaning they found that Boelens was a victim of Zylka's false statements.

Without question, the prosecutor pressed the embezzlement theory to the jury, emphasizing Boelens' complicity in the crimes, and describing Boelens as a "thief," and a "man who is entrusted with funds and then he embezzled those funds." Nonetheless, the Appellate Division essentially decided that this was a case of larceny by false pretenses and, though Conroy argued that the evidence was insufficient as a matter of law on both theories, did not "determine whether the evidence was legally sufficient to establish defendant's guilt on the embezzlement theory." (App. 5-6) Having settled on one theory of liability, and having chosen to ignore the other, it was then easy for the court to decide that due process did not demand unanimity even if the elements of the generic crime were different and the theories of liability were conflicting. Yet this remains a difficult and unresolved constitutional question, resulting in inconsistent and conflicting decisions by the State courts.

This Court has held that neither the Fifth nor the Sixth Amendments *necessarily* requires that a state jury be unanimous in a criminal case. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). That the jury does not *always* have to be unanimous, however, does not mean it *never* has to be unanimous. The Court has required that a six-member jury be unanimous. Burch v. Louisiana, 441 U.S. 130 (1979). And, in Schad v. Arizona, 501 U.S. 624 (1991), the Court addressed whether due process mandated juror unanimity when the prosecutor presented alternative theories of murder. Though a plurality of the Court determined that, in the case before it, jury unanimity was not required, the plurality also emphasized that a crime may not be so "generic" that "any combination of jury findings ... would suffice for conviction." Id. at 633. As the plurality explained:

> This is not to say, however, that the Due Process Clause places no limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred. The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning ... carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him.

Id. at 632-33 (citations omitted).

Four Justices dissented in Schad, believing that In re Winship, 397 U.S. 358 (1970), provided the governing principles, and that a conviction must rest on "proof beyond a reasonable

doubt" of every fact necessary to constitute the crime. 501 U.S. at 652 (White, J., dissenting). Consequently, the presentation of different theories of a crime, if it requires the jury to make different factual determinations, violates due process. Id. at 656-59.

This Court reaffirmed this principle in Richardson v. United States, 526 U.S. 813 (1979). There, the Court, in holding that a federal jury must unanimously agree on the specific violations that make out a "continuing criminal enterprise," recognized the complexity surrounding whether a fact is a "means" to committing the crime or an element of the crime. The distinction, the Court noted, is extraordinarily significant because, according to the Court, the Constitution restricts the power of a State to "define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. Id. at 820.

The State courts have grappled with the question of whether the State has proven each element of a "generic" crime beyond a reasonable doubt when the crime can be committed in alternative ways, or the elements of the crime differ, and the jury is not required to unanimously agree on the underlying facts that rendered defendant's conduct of a crime. The conflict is well documented. See generally, Tim A. Thomas, Requirement of Jury Unanimity As To Mode of Committing Crime Under Statute Setting Forth The Various Modes By Which Offense May Be Committed, 75 ALR 4th 91 (2008); Wayne LaFave, Jerold Israel and Nancy King, 6 Crim. Proc., §24.10(c) (3d ed. 2008).

Some courts have held that unanimity is required when the possible ways of violating a generic statute are conceptually

distinct.[3] Other courts have disagreed and have held that unanimity is not required, provided the statute states a single offense.[4] Still other courts have held that, if the modes of commission are different, the prosecution must elect one theory or prove each of the modes beyond a reasonable doubt.[5] The result is confusion.

The issue is recurring, and, as this case graphically demonstrates, it presents a significant constitutional dilemma. No court has adequately defined what constitutes a crime so "generic" that its various means of commission are elements of the crime and not "brute facts." Richardson, 526 U.S. at 817. Certainly, "larceny" is as broad and generic a crime as can be envisioned. With a crime as "generic" as larceny, a State, as New York has done here, can group very different types of conduct under one label and then, as in this case, present the jury with different, even intrinsically inconsistent theories, and hope that, even if the jurors are not in agreement about exactly what it is the defendant has done, the jurors will all agree that he has done something that they have been instructed is criminal.

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[3] See, e.g., State v. Martinez, 278 Conn. 598, 900 A.2d 485 (2006); State v. Lotches, 331 Or. 455, 17 P.3d 1045 (2000), cert. denied, 534 U.S. 833 (2001); State v. Boots, 308 Or. 371, 780 P.2d 725 (1989); State v. Seymour, 183 Wisc. 2d 683, 515 N.W.2d 874 (1994); State v. Coleman, 159 Wash. 509, 150 P.3d 1126 (2007); State v. Bzura, 261 N.J. Super. 602, 619 A.2d 647 (1993); State v. Amato, 2008 WL 398791 (N.J. Super. A.D. 2008).

[4] See, e.g., Rice v. State, 532 A.2d 1357, 311 Md. 116 (1987); People v. Sullivan, 173 N.Y. 122, 65 N.E. 189 (1903); State v. Wilson, 220 Kan. 341, 552 P.2d 931 (1976); Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978); Taylor v. State, 840 N.E.2d 324 (Ind. 2006); State v. James, 698 P.2d 1165 (Alaska 1985).

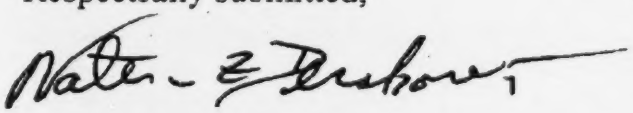
[5] See, e.g., People v. Salyer, 80 P.3d 831 (Colo. Ct. App. 2003), cert. denied, 541 U.S. 998 (2004); State v. Famiglietti, 219 Conn. 605, 595 A.2d 306 (1991).

Here, the principal wrongdoers plead guilty. The jury heard extensive evidence about a $27 million loss to investors. It was faced only with a lawyer-defendant who drafted some of the loan documents that led to the loss. It is not surprising that the jury could agree on "larceny," even if it did not agree on what Conroy had done to aid and abet that very broad crime. Whether that level of uncertainty comports with the constitutional requirement that a defendant's guilt be proved beyond a reasonable doubt is an important constitutional question that should be resolved.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Dated: September 22, 2008

# APPENDIX

People v Conroy

2008 NY Slip Op 06278

Decided on July 15, 2008

Appellate Division, First Department

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This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on July 15, 2008

Friedman, J.P., Nardelli, Gonzalez, McGuire, JJ.

495 495A *5705101*

[*1] The People of the State of New York, Respondent,

v

James Conroy, Defendant-Appellant.

Dershowitz, Eiger & Adelson, P.C., New York (Nathan Z. Dershowitz of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 25,

2004,convicting defendant, after a jury trial, of grand larceny in the first degree (three counts), tampering with physical evidence (two counts), and conspiracy in the fourth degree, and sentencing him to concurrent terms of 4 to 12 years on the larceny convictions and 1 to 3 years on the tampering and conspiracy convictions, unanimously modified, on the law, to the extent of vacating the tampering convictions and dismissing those two counts of the indictment, and otherwise affirmed. Appeal from order (same court and Justice), entered on or about March 15, 2004, which denied defendant's CPL 330.30 motion to set aside the verdict, unanimously dismissed as taken from a non appealable paper, and as subsumed in the appeal from the judgment. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

The verdict convicting defendant of three larcenies from Evergreen Securities Fund, a fund managed by Martin Boelens – who also was convicted of various federal and state fraud crimes – of $5 million, $9.7 million and $13 million, was based on legally sufficient evidence and was not against the weight of the evidence. Boelens first met in late October or early November of 1999 with both William Zylka, the central player in the fraudulent scheme charged in the indictment, and defendant, a lawyer at a well-known law firm in Manhattan with expertise in corporate matters and sophisticated financial transactions. By that time, defendant had lost his partnership position at the firm, was earning much less than he had in prior years and was having financial difficulties. The jury heard compelling evidence, independent of Boelens, from which it reasonably could have concluded that defendant knew, even before the first meeting with

Boelens, that Zylka was a virtually impecunious swindler and not the magnanimous billionaire he professed to be. Among other things, the jury heard evidence that Zylka had failed to repay defendant the substantial sums of money he had loaned to Zylka, in steadily decreasing amounts; evidence that defendant had swindled an elderly woman, Guna Munters, out of some $200,000 representing the proceeds of a refinancing of her home that she invested in a supposed shipping venture in Latvia that Zylka promised would be repaid, along with an immense, $5 million profit when the Latvian deal went through; evidence that defendant had falsely represented that Ms. Munters had been employed by an entity controlled by Zylka in letters defendant prepared in connection with another refinancing of her home arising out of a looming foreclosure caused by Zylka's failure to keep his promise to make the mortgage payments; evidence that defendant knew that Zylka had managed to persuade Ms. Munters to give him the $30,000 proceeds from the refinancing; and evidence that defendant represented Zylka in Zylka's unsuccessful efforts to borrow $1 million from a Russian man named Finkel on highly favorable terms (18% interest with the loan to be repaid after one year and a $500,000 bonus to be paid three years later) that was to be collateralized by a property Zylka owned in Connecticut, a property that defendant knew had been appraised at only $150,000.

With respect to the first theft, of $5 million, from Evergreen, there was a wealth of evidence from which the jury reasonably could have concluded that defendant knew that Zylka was seeking to steal $5 million from Evergreen by falsely representing that the collateral being offered by Zylka to back the $120 million guarantee by a Zylka-controlled entity of

Evergreen's obligations was worth only about $1 million rather than the hundreds of millions of dollars that Zylka assured Boelens it was worth. That evidence included evidence from which the jury reasonably could have concluded that: (1) the collateral, a limestone property in Montana known as MGM Land, was not even owned by Zylka when he first claimed to own it, contrary to his representations that it had been in the ostensible Zylka trust structure for decades; (2) defendant, on account of his role in the negotiations with the actual owner of MGM that led to its acquisition by the Zylka entity issuing the guarantee, knew that it was worth, at most, little more than the $1 million dollars Zylka agreed to pay to the owner; (3) defendant not only made a false representation to the owner that his law firm had already received the first installment payment (of $250,000) due to the owner from Zylka to induce the owner to transmit to defendant the stock certificates for MGM, but made that false representation for the purpose of advancing Zylka's scheme; (4) defendant knew that the $5 million "loan" that Evergreen was providing to MGM in exchange for the guarantee was not being used exclusively by MGM in mining operations (as was required by documents defendant drafted) but instead was being used in part to finance the acquisition of MGM for $1 million, the very asset that supposedly was so valuable as to constitute more than adequate collateral for the $120 million guarantee; (5) defendant well knew, contrary to Zylka's representations to Boelens, that he, defendant, was not the trustee of a Zylka family trust created by defendant that owned the limestone property; (6) defendant falsely assumed the role of a cautious trustee, not merely a lawyer, with his own decision-making authority over the potential deal with Evergreen, and thereby added an air of respectability and legitimacy that Zylka would not

have had on his own; (7) defendant prepared two different escrow agreements for the $5 million, the one that Boelens received that made clear that Evergreen had an interest in the $5 million and the one submitted to defendant's law firm that made no mention of Evergreen and stated that the money would be held solely for MGM; and (8) defendant personally received $50,000 of the $5 million with his law firm receiving $100,000.

From this and other evidence, the jury reasonably could have concluded that defendant shared Zylka's larcenous intent and committed various acts that were intended to aid and did aid Zylka in the commission of a $5 million larceny by false pretenses from Evergreen. Although the assistance defendant provided to Zylka in the commission of the other two larcenies was less extensive, from all the evidence the jury reasonably could have determined that defendant continued to act with the requisite intent "to deprive another of property or to appropriate the same to himself or to a third person" (penal Law § 155.05 [1]). Weighing the "relative probative force of conflict in testimony and the relative strength of conflicting inferences that may be drawn from the testimony" *(People v Bleakley, 69* NY2d 490, 495 [1987]), we conclude that the verdict convicting defendant of the three larceny counts and the conspiracy count was not against the weight of the evidence.

The People's position at trial was that defendant was guilty of three of the larceny counts, the ones for which he was convicted, on either a false pretenses or an embezzlement theory of larceny *(see* Penal Law § 155.05[2][a]). We need not determine whether the evidence was legally sufficient to establish defendant's

guilt on the embezzlement *theory*. Rather, defendant's conviction for the three larceny crimes can and should be sustained on the basis of the legally sufficient evidence that provided compelling proof of his guilt of larceny by false pretenses *(see People v Ponnapula,* 229 AD2d 257,273 [1997] ["when disjunctive theories of criminality are submitted to the jury and a general verdict of guilt is rendered, a challenge based on evidentiary insufficiency will be rejected as long as there was sufficient evidence to support any of the theories submitted"]; *see also Griffin v United States,* 502 US 46, 59-60 [1991]).

Defendant also contends that the larceny convictions should be reversed because the testimony of Boelens, whom the trial court found to be an accomplice as a matter of law, was not corroborated as required by CPL 60.22(1). This claim, however, is not preserved for review as defendant never raised this objection when moving to dismiss either at the close of the People's case or after all the evidence was before the jury (CPL 470.05[2]; *People v Sala,* 95 NY2d 254,260-261 [2000]). As an alternative holding, we reject this claim on the merits as there were numerous items of evidence, each of which was sufficient to satisfy the requirement that there be "some basis for the jury to conclude the accomplice testimony is credible" *(People v Besser,* 96 NY2d 136, 143 [2001]).

The court properly instructed the *jury* that it was not required to be unanimous as to whether defendant committed larceny by false pretenses or by embezzlement *(see e.g. People v Ponnapula,* 229 AD2d at 273), and we reject defendant's constitutional argument in this regard *(see Schad v Arizona,* 501 US 624, 630-645 [1991] [plurality opinion]; *see* also id. at

648-652 [Scalia, J., concurring]). In *People* v *Mateo* (2 NY3d 383,406 [2004], *cert denied* 542 US 946 [2004]), the Court ofAppeals rejected the claim that "due process requires that the command theory [of murder] be considered by the jury apart from the actual killer theory, and that the jury be unanimous on one theory or the other." In so holding, the Court relied on New York's "long history of treating actual killers and commanders as moral equivalents" *(id.* at 408). The same moral equivalence obtains with respect to thieves who steal by false pretense and those who steal by embezzlement. Indeed, as the People point out, beginning in 1942 the Penal Law defined larceny as the wrongful taking, obtaining or withholding of property with the requisite larcenous intent"*by any means whatever*" (former Penal Law § 1290 [L 1942, ch 732J [emphasis added]). Even assuming that the false pretenses and embezzlement theories should be viewed, under the facts of this case, as involving divergent views of defendant's conduct, he was not entitled to an instruction that the jurors must unanimously choose one theory or the other *(see People* v *Sullivan,* 173 NY 122 [1903]).

Defendant's other complaint about the court's charge – that it was "confusing" in instructing the jurors that they did not have to be unanimous on the theory of larceny but were required to be unanimous that all the elements of a particular larceny had been proven beyond a reasonable doubt – is unpreserved as defendant voiced no objection on this ground; we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits. The court's instructions made clear what the term "elements" meant, and the jury expressed no confusion on this score. Moreover, during the charge, the court instructed the jury that it also had to be unanimous with respect

to "all the facts necessary to substantiate each element." In isolation, this instruction is unclear, but on its face it imposes a burden on the prosecution, and it thus is not surprising that defendant did not object to it; nor does defendant complain about it on appeal. The court immediately went on to instruct the jury, as it did during the prosecutor's summation, that it had to be unanimous with respect to any particular false representation alleged by the prosecution. The prosecutor correctly opposed this instruction as an inaccurate statement of the law *(see People* v *Mateo,* 2 NY3d at 408-409). Accordingly, when the instruction to which defendant belatedly objects is viewed in context, i.e., with the accompanying instructions to which he never objected, it is clear that the charge as a whole conferred a benefit upon defendant to which he was not entitled.

The court properly exercised its discretion in admitting uncharged crime evidence i.e., the evidence relating to Ms. Munter's dealings with Zylka and Zylka's efforts to obtain a loan from Mr. Finkel – that was highly relevant to the critical issue of the extent of defendant's knowledge of Zylka's actual financial situation *(see People v Alvino,* 71 NY2d 233,245 [1987]). The probative value of this evidence outweighed any prejudicial effect, which was minimized by the court's clear and repeated instructions to the jury explaining the proper use of the evidence.

The court also properly exercised its discretion in denying defendant's mistrial motion made on the basis of a remark made by the prosecutor at the end of the re cross-examination of defendant, since the court's curative actions were sufficient to prevent any prejudice. Defendant's other claims of prosecutorial

misconduct are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject these claims on the merits and find no basis for reversal.

Finally, defendant's challenge to the sufficiency of the evidence underlying the convictions for the two counts of tampering with physical evidence has merit. Although the evidence supports the conclusion that the two false documents at issue were created by defendant to protect Zylka from his creditors, there is no valid line of reasoning nor any permissible inferences to support the additional and necessary conclusion that defendant's conscious objective in creating either document was that it "be used or introduced *in* an official proceeding or a prospective official proceeding" (Penal Law § 215.40[1][a] [emphasis added]). To the contrary, the only reasonable inference from the evidence is that defendant's intent was to deceive Zylka's creditors. If that effort were successful, neither document would be used or introduced in either of the two official proceedings, the Wheaton foreclosure action and the all but inevitable Evergreen bankruptcy, that the court instructed the jury without objection by the prosecution were at issue. In light of our determination with regard to the sufficiency of the evidence, we need not and do not reach either defendant's challenge to the weight of the evidence or his claim that his retrial on the tampering counts was barred by double jeopardy on the ground that the evidence at the first trial was legally insufficient on these same counts.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

State of New York

Court of Appeals

**BEFORE: HON. VICTORIA A. GRAFFEO,**

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

-against-

JAMES CONROY, Appellant.

**CERTIFICATE DENYING LEAVE**

I, VICTORIA A. GRAFFEO, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellants for a certificate pursuant to section 460.20 of the Criminal Procedure Law and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: August 29th, 2008

at Albany, New York

/s/

Associate Judge

* Order of the Appellate Division, First Department, entered July 15, 2008, modifying a judgment of the Supreme Court, New York County, rendered March 25, 2004, and dismissing an appeal from an order of said court, entered on or about March 15, 2004.